

No. PD-0928-20

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COURT OF CRIMINAL APPEALS
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TO THE COURT OF CRIMINAL APPEALS
OF TEXAS

Ijah Baltimore
v.
State of Texas

On Petition for Discretionary Review from the Tenth Court of Appeals in
No. 10-19-00196-CR affirming the judgments in cause number 2017-449-C2,
from the 54th District Court, McLennan County

APPELLANT'S PETITION FOR DISCRETIONARY REVIEW
ORAL ARGUMENT REQUESTED

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STATEMENT REGARDING ORAL ARGUMENT

Oral argument is requested.

STATEMENT OF THE CASE

Following a jury trial in trial court cause number 2016-670-C2 in McLennan County's 54th District Court, a jury found Baltimore guilty of the charged offense of unlawful carrying a weapon on a premise licensed to sell alcoholic beverages. The jury sentenced Baltimore to 4 years and no fine and recommended that the trial court suspend imposition of that sentence and place Baltimore on community supervision (CR 71, 6 RR 30). The trial court suspended imposition of sentence in accordance with the verdict, placed Baltimore on community supervision for 4 years, and certified his right to appeal (CR 136).

Baltimore raised a sole point of error before the Tenth Court of Appeals at Waco challenging the legal sufficiency of the evidence to support his conviction (Appellant's Br. at iii, ix).

Baltimore seeks this Court's discretionary review from the Tenth Court of Appeals judgment in cause number 10-19-00196-CR.

STATEMENT OF PROCEDURAL HISTORY

The Tenth Court of Appeals issued its judgment and published opinion on August 26, 2020. *See* App. A.

This Petition is timely filed on or before October 26, 2020, after one request for an extension of time was granted on September 29, 2020.

I. GROUND FOR REVIEW

Must the State offer proof of the parameters of a licensed premises to secure a conviction for unlawfully carrying a weapon on licensed premises?

A. Reason for Review

The Tenth Court of Appeals (following the decisions of the Houston, Fort Worth and Amarillo courts) has decided an important question of state law that has not been, but should be, settled by this Court; specifically, whether a parking lot in front of a licensed premises is necessarily included within the ‘premises’ under section 11.49(a) of the Alcoholic Beverage Code. *See* TEX. R. APP. P. 66.3(b).

B. Argument

According to Statista¹, there are over 830,000 gun owners in Texas. It is all too common that parking lots are privately owned, publicly owned by a municipality, a hybrid of private-public ownership, or serve multiple

¹ Statista.com consolidates statistical data on over 80,000 topics from more than 22,500 sources. Available at: <https://www.statista.com/statistics/215655/number-of-registered-weapons-in-the-us-by-state/>

businesses.² The Waco Court essentially held that a person cannot carry a handgun inside of or directly en route to their motor vehicle that is in a parking lot, which is otherwise permissible under Penal Code § 46.02, if that lot is merely near or close to an establishment licensed to sell alcoholic beverages. This holding impacts nearly one million Texans.

For this reason, it is important that this Court settle the issue of whether a parking lot in front of a licensed premises is part of the ‘premises’ under section 11.49(a) of the Alcoholic Beverage Code, merely because of its proximity to the licensed premises.

In his sole point of error, Baltimore complained that the evidence was legally insufficient to support his conviction. *Baltimore v. State*, No. 10-19-00196-CR at *2 (Tex. App.—Waco August 26, 2020). Specifically, Baltimore argued that there is no evidence regarding the location of the boundaries of the licensed premises, the Crying Shame, such as testimony that the the parking lot was part of the “grounds” or was “directly or indirectly under the control” of the Crying Shame. *Id.*

² According to *Mall & Centers Shopping Guide*, there are 158 malls in Texas. Available at: <https://tinyurl.com/y2e2l25q>. Most malls are mixed use between retail and restaurant chains.

Section 11.49(a) of the Alcoholic Beverage Code defines “licensed premises” as:

the grounds and all buildings, vehicles, and appurtenances pertaining to the grounds, including any adjacent premises if they are directly or indirectly under the control of the same person.

There was no testimony at trial regarding the boundaries of the premises controlled by the Crying Shame or whether the parking lot at issue was directly or indirectly under the control of the Crying Shame. (Appellant’s Br. at 1.)

In *Richardson v. State*, the appellant challenged raised a similar challenge to the legal sufficiency of the evidence. (823 S.W.2d 773, 776 (Tex. App. — Ft. Worth 1992, no pet.)). In concluding the evidence was sufficient, the court specifically reasoned that, “[appellant] could have been found to have been in possession of an unlawful weapon on licensed premises while in the convenience store or while inside the vehicle which was on the [convenience store] parking lot.” (*id.*). Importantly, the court held that “the parking lot of a licensed premises is part of the ‘premises’ pursuant to section 11.49(a) of the Alcoholic Beverage Code.” (823 S.W.2d 773, 776 (Tex.

App. — Ft. Worth 1992, no pet.)). In support, the court cited its own decision *Wishnow v. Texas Alcoholic Beverage Com'n*, 757 S.W.2d 404, 410 (Tex. App. — Ft. Worth 1988, writ denied).

Wishnow was an appeal from a permit suspension by the Alcoholic Beverage Commission. (*Id.* at 406). Appellant challenged the sufficiency of the evidence of the hearing examiner's findings as to the extent of his knowledge of a violation that included a delivery of cocaine on the sidewalk outside the club, which appellant argued was not "on the premises" under the Section 11.49(a) definition. (*Id.* at 406, 409). The Alcoholic Beverage Code holds a permittee responsible for supervising the premises. (*Id.* at 410.) Appellant admitted that he exerted control over his establishment and that operation of the business extended to the parking lot, which included him and his employees "routinely checking the parking lot for loiterers and other suspicious people and they watch single women to be sure they reach their cars safely." (*Id.* at 410). Appellant further admitted that he employed a doorman whose "primary duty it was to work the front door and monitor the area adjacent thereto." (*Id.*) This doorman was the individual charged with the delivery of cocaine. (*Id.*) The

court pointed to appellant's own admissions that he exercised control over the parking lot as sufficient evidence that the sidewalk was part of the premises under the Section 11.49(a) definition. (*Id.*)

Crucially however, the *Wishnow* court did not say whether it was holding that the sidewalk was part of the "grounds" or part of "adjacent premises [that were] directly or indirectly under the control of the same person."

Four years later in *Richardson*, the Fort Worth court makes this unsupported distinction on its own and uses *Wishnow* as its authority. This was of little consequence in *Richardson* and is arguably dicta because the evidence was sufficient to show that appellant had in fact carried a weapon inside the store. 823 S.W.2d at 776.

For Baltimore however, this distinction is critical. Unlike in *Wishnow* where it was clear that the parking lot was a part of the premises based on the testimony that the appellant and his employees routinely monitored parking lot activities and had a designated employee charged with this responsibility, the State

presented no such evidence here.

Romero v. State appears to have recognized the distinction crafted in *Richardson* and based its dubious holding on it. In *Romero*, appellant argued that the State was required to prove that the parking lot was directly or indirectly under the control of the licensed premises. 2008 WL 2369691 at *3 (Tex. App. – Amarillo, June 11, 2008, no pet.) (not designated for publication). As here, the question in *Romero* was whether a parking lot in front of a bar was part of the premises under the Section 11.49(a) definition. The *Romero* court concluded that it was, reasoning that:

Appellant argues the State was required to produce evidence the parking lot was directly or indirectly under the control of the same person. *That would be true if the State were showing appellant carried the handgun on premises adjacent to the licensed premises.* As we see the evidence, the jury could have concluded the parking lot or area in front of the bar, in which appellant's vehicle was parked, was a part of the bar premises, not adjacent premises. . . Thus, in *Richardson v. State*, 823 S.W.2d 773, 776 (Tex. App. Ft. Worth 2002, no pet.), the court found the parking lot of a convenience store to be part of the “premises” pursuant to Section 11.49(a) of the Texas Alcoholic Beverage Code.

(emphasis added)

Here, following the Houston, Fort Worth and Amarillo courts, the

Waco court reasoned that the evidence was legally sufficient based on conclusory statements about mere proximity and the expression of “some degree of control” by bar management by preventing patrons from exiting the building during the investigation. *Baltimore v. State*, No. 10-19-00196-CR at *6; *see also Jackson v. Virginia*, 443 U.S. 307 (1979). It unclear to Baltimore how preventing patrons from exiting a bar demonstrates control over a parking lot outside the bar.

Baltimore expressly cautioned the court of appeals against placing reliance on the unsupportable *Richardson* distinction, as it appears the Amarillo Court did,³ that a parking lot is necessarily a part of a permittee’s “grounds” without affirmative evidence that it is. A permittee’s control of a parking lot cannot be inferred from mere proximity. It is all too common that parking lots are privately owned, publicly owned by a municipality, a hybrid of private-public ownership, or serve multiple businesses.⁴

³ *Richardson* has even been construed to stand for the proposition that a parking lot [in front of?] of a licensed premises is controlled by the licensee as a matter of law. *George v. State*, 1995 WL 155535 at *1 (Tex. App. — Houston [1st] April 6, 1995, no pet.)(not designated for publication).

⁴ For example, most shopping malls are mixed use between retail and restaurant chains. According to *Mall & Centers Shopping Guide*, there are 158 malls in Texas.

The Waco court essentially held that a person cannot carry a handgun inside of or directly en route to their motor vehicle if the vehicle is in a parking lot near an establishment licensed to sell alcoholic beverages. Under today's commercial standards, parking lots are frequently shared by many businesses, and their ownership and control vary widely.

Therefore, to sustain a conviction for unlawfully carrying a weapon on a licensed premises when the alleged offense occurs in a parking lot near a licensed premises, the State must prove that the parking lot is either: (1) actually part of the grounds of the licensed premises (*i.e.*, owned or leased by the licensed premises); or (2) under the direct or indirect control of the licensed premises. The State failed to offer such evidence in Baltimore's case, and the Waco Court accordingly erred by finding the evidence sufficient to sustain his conviction.

PRAYER

WHEREFORE, PREMISES CONSIDERED, Appellant Baltimore prays

Available at: <https://tinyurl.com/y2e2l25q>. Most malls

this Court (1) grant his Petition, and (2) reverse the lower court's judgment and hold that, because the evidence is legally insufficient, an acquittal is required.

Respectfully submitted,



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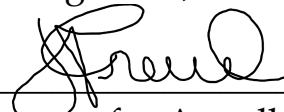
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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of Appellant's Petition was e-served on both Sterling Harmon of the District Attorney for McLennan County, Texas, at sterling.harmon@co.mclennan.tx.us and State Prosecuting Attorney at Stacey.Soule@spa.texas.gov, on August 26, 2020.



Attorney for Appellant

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

IJAH BALTIMORE

v.

STATE OF TEXAS

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§
§
§
§

NO. PD-0928-20

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 9.4(i)(2)(D), I hereby certify that the Appellant's
Petition contains 2,211 words. The document was prepared using Microsoft
Word, and the word count was generated using that program.



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IN THE
TENTH COURT OF APPEALS

No. 10-19-00196-CR

IJAH IWASEY BALTIMORE,

Appellant

v.

THE STATE OF TEXAS,

Appellee

From the 54th District Court
McLennan County, Texas
Trial Court No. 2017-449-C2

OPINION

Ijah Baltimore appeals from a conviction for unlawful possession of a weapon on premises licensed to sell alcohol. TEX. PENAL CODE ANN. § 46.02(c). In his sole issue, Baltimore complains that the evidence was insufficient for the jury to have found that he committed the offense on the premises of an establishment licensed to sell alcohol because there was insufficient evidence for the jury to have found that the parking lot

where he possessed the firearm was part of the premises of the establishment.¹ Because we find that the evidence was sufficient, we affirm the judgment of the trial court.

STANDARD OF REVIEW — SUFFICIENCY OF THE EVIDENCE

The Court of Criminal Appeals has expressed our standard of review of a sufficiency issue as follows:

When addressing a challenge to the sufficiency of the evidence, we consider whether, after viewing all of the evidence in the light most favorable to the verdict, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S. Ct. 2781, 61 L. Ed. 2d 560 (1979); *Villa v. State*, 514 S.W.3d 227, 232 (Tex. Crim. App. 2017). This standard requires the appellate court to defer "to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts." *Jackson*, 443 U.S. at 319. We may not re-weigh the evidence or substitute our judgment for that of the factfinder. *Williams v. State*, 235 S.W.3d 742, 750 (Tex. Crim. App. 2007). The court conducting a sufficiency review must not engage in a "divide and conquer" strategy but must consider the cumulative force of all the evidence. *Villa*, 514 S.W.3d at 232. Although juries may not speculate about the meaning of facts or evidence, juries are permitted to draw any reasonable inferences from the facts so long as each inference is supported by the evidence presented at trial. *Cary v. State*, 507 S.W.3d 750, 757 (Tex. Crim. App. 2016) (citing *Jackson*, 443 U.S. at 319); see also *Hooper v. State*, 214 S.W.3d 9, 16-17 (Tex. Crim. App. 2007). We presume that the factfinder resolved any conflicting inferences from the evidence in favor of the verdict, and we defer to that resolution. *Merritt v. State*, 368 S.W.3d 516, 525 (Tex. Crim. App. 2012). This is because the jurors are the exclusive judges of the facts, the credibility of the witnesses, and the weight to be given to the testimony. *Brooks v. State*, 323 S.W.3d 893, 899 (Tex. Crim. App. 2010). Direct evidence and circumstantial evidence are equally

¹ Baltimore does not challenge that he was unlawfully carrying a weapon in this appeal. His complaint is whether the State proved the element necessary to enhance the offense from a Class A misdemeanor to a third degree felony, specifically did he carry the weapon on the premises licensed or issued a permit by the State for the sale of alcoholic beverages.

probative, and circumstantial evidence alone may be sufficient to uphold a conviction so long as the cumulative force of all the incriminating circumstances is sufficient to support the conviction. *Ramsey v. State*, 473 S.W.3d 805, 809 (Tex. Crim. App. 2015); *Hooper*, 214 S.W.3d at 13.

We measure whether the evidence presented at trial was sufficient to support a conviction by comparing it to "the elements of the offense as defined by the hypothetically correct jury charge for the case." *Malik v. State*, 953 S.W.2d 234, 240 (Tex. Crim. App. 1997). The hypothetically correct jury charge is one that "accurately sets out the law, is authorized by the indictment, does not unnecessarily increase the State's burden of proof or unnecessarily restrict the State's theories of liability, and adequately describes the particular offense for which the defendant was tried." *Id.*; see also *Daugherty v. State*, 387 S.W.3d 654, 665 (Tex. Crim. App. 2013). The "law as authorized by the indictment" includes the statutory elements of the offense and those elements as modified by the indictment. *Daugherty*, 387 S.W.3d at 665.

Zuniga v. State, 551 S.W.3d 729, 732-33 (Tex. Crim. App. 2018).

UNLAWFULLY CARRYING A WEAPON

Section 46.02(a) of the Penal Code states that:

- (a) A person commits an offense if the person:
 - (1) intentionally, knowingly, or recklessly carries on or about his or her person a handgun; and
 - (2) is not:
 - (A) on the person's own premises or premises under the person's control; or
 - (B) inside of or directly en route to a motor vehicle or watercraft that is owned by the person or under the person's control.

TEX. PENAL CODE ANN. § 46.02(a). This offense is a third-degree felony "if the offense is committed on any premises licensed or issued a permit by this state for the sale of alcoholic beverages." TEX. PENAL CODE ANN. § 46.02(c).

Section 46.02 sets forth a definition of “premises” as including “real property and a recreational vehicle that is being used as living quarters, regardless of whether that use is temporary or permanent.” TEX. PENAL CODE ANN. § 46.02(a-2). The charge to the jury did not include that definition, however. There was no dispute that Baltimore was not on his own premises or premises under his control. Rather, presumably because the offense is elevated if it is “committed on any premises licensed or issued a permit by this state for the sale of alcoholic beverages,” the jury charge included the definition of “premises” contained in the Alcoholic Beverage Code relating to premises of an establishment licensed to sell alcoholic beverages.² Section 11.49(a) of the Alcoholic Beverage Code defines “licensed premises” as:

the grounds and all buildings, vehicles, and appurtenances pertaining to the grounds, including any adjacent premises if they are directly or indirectly under the control of the same person.

TEX. ALCO. BEV. CODE ANN. § 11.49(a). Baltimore complains that there was no evidence regarding the boundaries of the premises including whether the parking lot was “grounds” or “directly or indirectly under the control” of Crying Shame.³

² No challenge has been made to the propriety of the instruction given in the jury charge; therefore we will assume without deciding that the instruction was proper.

³ We should not be understood as holding that the parking lot of a business that is licensed to sell alcoholic beverages is necessarily part of the premises as that term is used in connection with the penal code provision at issue in this appeal. Nor have we been asked to determine whether “premises” as defined by the Alcoholic Beverage Code is consistent with or even relevant to the penal code provisions regarding “premises” as defined elsewhere in the penal code. *See, e.g.*, TEX. PENAL CODE ANN. § 46.035(f)(3). Those issues are simply not before us in this appeal. Baltimore has not contested the jury’s

FACTS

Baltimore went to Crying Shame, which was undisputedly an establishment licensed to sell alcohol, on his motorcycle. Baltimore parked very close to the front door of Crying Shame, which was shown on a photograph admitted into evidence. Baltimore had a firearm which he testified that he left in the saddlebag attached to his motorcycle while he was inside Crying Shame. Baltimore left approximately thirty minutes later and went to his motorcycle. Baltimore testified that he removed his cold gear including his jacket from the saddlebags and put it on because it was cold outside. The gun had been wrapped up in the jacket. While standing next to his motorcycle, Baltimore also put the firearm which had been wrapped up in his jacket in his pants.

Johnson, an individual with whom Baltimore had a previous disagreement, Johnson's then-girlfriend, and her cousin were departing Crying Shame when Baltimore was in the parking lot. The testimony was disputed as to whether they had seen each other in Crying Shame or only outside, but it is not relevant to this issue. Johnson testified that he went to his vehicle and pulled it up toward Baltimore's motorcycle. Johnson's girlfriend was in a separate vehicle parked behind Johnson. Johnson's girlfriend testified that she saw Baltimore approach the driver's side window of Johnson's vehicle. As Johnson attempted to back up, Baltimore put his foot behind one

finding that he unlawfully possessed the firearm. The only question is whether for this offense the State proved that the area immediately outside the front door and the parking lot are premises of Crying Shame.

of the tires on Johnson's vehicle, preventing him from backing up without running over Baltimore's foot. Johnson pulled forward slightly. Johnson's girlfriend had approached Johnson's vehicle. She testified that she saw Baltimore pull out the firearm and point it at Johnson. Johnson's girlfriend's cousin grabbed Baltimore and wrested the firearm away from him. The cousin pistol-whipped Baltimore with the gun and then threw it on the roof of Crying Shame after Baltimore demanded that he give it back. The firearm was later recovered from the roof of Crying Shame by law enforcement. The proprietors of Crying Shame assisted law enforcement in its investigation by preventing the remaining patrons from leaving the building to go into the parking lot in question while the firearm was retrieved.

Johnson and his girlfriend both testified that the altercation took place in the parking lot of the Crying Shame. Two law enforcement officers testified that the offense occurred in the parking lot of the Crying Shame. Specifically, one of the officers testified without objection that the parking lot was included as part of the premises of Crying Shame and that the legal definition of "premises" pursuant to the Alcoholic Beverage Code includes the parking lot. Photographic evidence showed that the offense occurred in the immediate proximity of the front door to the building of Crying Shame. The management of Crying Shame exercised some degree of control over the parking lot by preventing the patrons from going on the premises where the investigation was then ongoing.

In *Richardson v. State*, the appellant challenged the sufficiency of the evidence regarding what constituted the premises of a convenience store and if the parking lot was included. *Richardson v. State*, 823 S.W.2d 773 (Tex. App.—Fort Worth 1992, no pet.). The court held that the parking lot was included in what was likely dicta, as the appellant had taken the weapon into the convenience store as well as the parking lot. However, the court specifically stated that “the parking lot of a licensed premises is part of the ‘premises’ pursuant to section 11.49(a) of the Alcoholic Beverage Code.” *Id.* That court cited to another case, *Wishnow v. State*, in support of that holding. See *Wishnow v. Texas Alcoholic Beverage Com’n*, 757 S.W.2d 404 (Tex. App.—Houston [14th] 1988, pet. denied). In *Wishnow*, the appellant challenged the sufficiency of a hearing examiner’s findings regarding a suspension of a permit due to a violation based on a delivery of a controlled substance on the sidewalk outside of a club by the appellant’s doorman because there was testimony that the appellant frequently monitored the parking lot and therefore it was part of the premises of the club. See *Wishnow*, 757 S.W.2d at 410. Based on the reliance upon *Wishnow’s* description of the evidence presented regarding sufficiency of evidence to establish whether the sidewalk was part of the premises of the club, Baltimore contends that the evidence in this proceeding was lacking regarding whether the parking lot of Crying Shame was “grounds” or “adjacent premises directly or indirectly under the control” of Crying Shame.

The holding in *Richardson* was followed by the Amarillo court of appeals in

Romero v. State, No. 07-06-0198-CR, 2008 Tex. App. LEXIS 4221, at **10-13 (Tex. App.—Amarillo June 11, 2008, no pet.) (mem. op., not designated for publication). In *Romero*, a challenge was made to the sufficiency of the evidence regarding whether a parking lot was “directly or indirectly under the control” of the licensed business. The court recognized that there is a difference between what is required to be proved between “grounds” and “adjacent premises” in finding that the testimony regarding the parking lot that was immediately outside of the licensed business as “grounds” to be sufficient. Baltimore argues that we should not follow the *Richardson* and *Romero* courts’ holdings but should require more than close proximity in determining that a parking lot is part of the licensed premises of an establishment.

Baltimore argues that in order for the evidence to have been sufficient, the State was required to present specific evidence that the parking lot was “grounds or an adjacent premises that was directly or indirectly under the control of Crying Shame.” Baltimore further cites to *Terry v. State* as an example of what evidence should be required to establish what constitutes premises. See *Terry v. State*, 877 S.W.2d 68, 70 (Tex. App.—Houston [1st Dist.] 1994, no pet.). In *Terry*, the evidence held to be sufficient to establish what constituted licensed premises included the TABC license of the establishment and evidence by an employee that the establishment maintained the parking lot that its customers routinely used where the defendant was found with a weapon near a dumpster that the establishment owned. While certainly the State could

have presented more precise evidence defining the legal standing between Crying Shame and the parking lot, Baltimore has not provided any authority to show that the testimony that the parking lot was the parking lot of Crying Shame was not sufficient for any rational juror to find that the parking lot was part of the licensed premises of Crying Shame. Therefore, we hold that the uncontroverted evidence that was before the jury supports a rational jury conclusion that the offense occurred on the licensed premises of Crying Shame. We overrule Baltimore's sole issue.

CONCLUSION

Having found no reversible error, we affirm the judgment of the trial court.

TOM GRAY
Chief Justice

Before Chief Justice Gray,
Justice Davis, and
Justice Neill

Affirmed
Opinion delivered and filed August 26, 2020
Publish
[CR25]



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